MALAYSIAN REPORTS

LORRAIN ESME OSMAN v. ATTORNEY GENERAL OF MALAYSIA

[S.C. (Wan Suleiman S.C.J.) April 18, 1986]

[Kuala Lumpur – Supreme Court Civil Application No. 11 of 1986]

Practice and Procedure – Whether Supreme Court bound by its previous decision – Evidence obtained in Malaysia for foreign courts in criminal proceedings – R.H.C. 1980, O.66 – Courts of Judicature Act 1964, s.45 – Federal Constitution, arts. 4(4) & 128(1).

Constitutional Law – Application for leave to commence proceedings for declaration that subsidiary legislation is invalid – Whether Supreme Court bound by its previous decision – Application dismissed – R.H.C. 1980, O.66 – Federal Constitution, arts. 4(4) & 128(1).

In this case the applicant applied *ex parte* for leave to commence proceedings in the Supreme Court against the Attorney-General for declarations –

a) That insofar as Order 66 of the Rules of the High Court 1980 makes provision for the obtaining of evidence in Malaysia for foreign courts in criminal proceedings, it is invalid;

b) That all examinations carried out pursuant to the Order of the Chief Justice, Malaysia made on December 16, 1985 under Order 66 of the Rules of the High Court on the application to the High Court by one Simon Elliott Stone on behalf of the Attorney General Hongkong in relation to proceedings in the Supreme Court of Hongkong between the Attorney General of Hongkong and Lorrain Esme Osman and others, are invalid.

Subsequently the Attorney-General of Hongkong and the Government of Malaysia were included as interveners and the Attorney-General of Malaysia ceased to be the respondent and was substituted by the Government of Malaysia. The proceedings then proceeded *inter partes*. It was argued (a) that a decision of the Supreme Court in its appellate role does not bind the Supreme Court sitting in its constitutional role; (b) that the court was not bound by the decision of the Supreme Court in *Lye Thai Sang & Anor.* v. *Faber Merlin (M) Sdn. Bhd. & Ors.*(1); (c) that the majority decision of the Supreme Court in *Dato Hashim Shamsuddin* v. *Attorney-General Hongkong*(2) was wrong.

Held: (1) the Supreme Court sitting in its constitutional role is bound by its previous decision;

(2) the Court is unable to hold that the majority decision of the Supreme Court in *Dato Mohammed Hashim Shamsuddin* v. *Attorney-General, Hongkong,*(2) is wrong and therefore that an arguable case has been shown.

Cases referred to:

(1) *Lye Thai Sang & Anor.* v. *Faber Merlin (M) Sdn. Bhd. & Ors.* [1985] 2 M.L.J. 380.

(2) *Dato Mohammed Hashim Shamsuddin* v. *Attorney General, Hongkong* [1986] 2 M.L.J. 112.

(3) *Fitzleet Estates Ltd.* v. *Cherry (Inspector of Taxes)* [1977] 3 All E.R. 996.

(4) *Chancery Lane Safe Deposit & Offices Co. Ltd.* v. *Inland Revenue Commissioners* [1966] 1 All E.R. 1.

SUPREME COURT.

Colin Ross-Munro Q.C. (*Miss Khoo Phaik See* with him) for the applicant.

Clive Nicholls Q.C. (*C.K. Yeoh, Miss Lee Lay Aun* and *Suhendran Sockanathan* with him) for the intervener.

T. Selventhirananthan, Senior Federal Counsel (*Mohamed Rauff bin Nabi Box*, Senior Federal Counsel with him) for the respondent.

Wan Suleiman S.C.J.: The present proceedings commenced as an *ex parte* Notice of Motion (subsequently amended) under Article 4(4) or alternatively under Article 128(1) of the Constitution and section 45 of the Courts of Judicature Act 1964 for leave to commence proceedings in the Supreme Court against the Attorney General, Malaysia for declarations:

a) That insofar as Order 66 of the Rules of the High Court 1980 makes provision for the obtaining of evidence in Malaysia for foreign courts in criminal proceedings, it is invalid;

b) That all examinations carried out pursuant to the Order of the Chief Justice, Malaysia made on December 16, 1985 under Order 66 of the Rules of the High Court on the application to the High Court by one Simon Elliot Stone on behalf of the Attorney General Hong Kong in relation to proceedings in the Supreme Court of Hong Kong between the Attorney General of Hong Kong and Lorrain Esme Osman and others, are invalid.

On the application of Mr. Clive Nicholls, Q.C. on behalf of the Attorney General Hong Kong, and Encik T. Selventhiranathan, Senior Federal Counsel, on behalf of the Government of Malaysia, for leave to intervene, the application not being opposed by Mr. Colin Ross-Munro, Q.C., I allowed both the Attorney General of Hong Kong and the Government of Malaysia to be included as interveners; the Attorney General of Malaysia therefore ceased to be respondent and in his stead is substituted the Government of Malaysia.

The proceedings then proceeded *inter partes.*

The substance of Mr. Ross-Munro's submission

on the merits is that he must show an arguable case in order to persuade the court to grant leave and that such an arguable case need not amount to a *good* arguable case.

I need not go into his long, able and persuasive submission in detail but would only deal with two important points which arise therefrom.

First, arising out of a decision of this court cited on behalf of the applicant, *i.e. Lye Thai Sang & Anor.* v. *Faber Merlin (M) Sdn. Bhd. & Ors.*[1] wherein this court held that section 69(4) of the Courts of Judicature Act did not confer upon it unlimited power to re-open, re-hear, re-examine, reverse or set aside a judgment given in an appeal already heard and disposed of by it, I am invited to say that a decision of the Supreme Court in its appellate role does not bind the Supreme Court sitting in its constitutional role.

Secondly, as one would expect, this court's recent decision in *Dato' Mohamed Hashim Shamsuddin* v. *Attorney-General, Hong Kong*[2] was not only cited but also dissected with great forensic skill and precision.

It has not failed to attract my attention nor I have been allowed to overlook such fact by able counsel for the interveners, that the present applicant Encik Lorrain Osman had applied for and been allowed to intervene therein.

It is also an incontrovertible fact that what was decided in that appeal is on substantially the same matters now before me.

With regard to the question as to whether the decision in *Lye Thai Sang* binds this court while sitting in its constitutional role, my answer would be a definite "yes". I cannot see how section 69(4) of the Courts of Judicature Act can be interpreted otherwise.

Even if the Supreme Court were to accept the principle embodied in the Practice Statement (Judicial Precedent) of the House of Lords issued on July 26, 1966, and I am not saying that a similar practice statement is being considered to be made applicable here, I would like to cite the words of Lord Wilberforce in the House of Lords' decision in *Fitzleet Estates Ltd.* v. *Cherry (Inspector of Taxes)*[3] wherein the House of Lords was asked to depart from its decision in *Chancery Lane Safe Deposit & Offices Co. Ltd.* v. *Inland Revenue Commissioners*[4] in which a differently constituted committee of the House of Lords had, by a 3:2 majority, held that section 170 of the 1952 Act did apply to such a case, on the basis that the House should depart from that decision on the grounds that it was wrong:—

> "My Lords, in my firm opinion, the 1966 Practice Statement was never intended to allow and should not be considered to allow such a course. Nothing could be more undesirable, in fact, than to permit litigants, after a decision has been given by this House with all appearance of finality, to return to this House in the hope that a differently constituted committee might be persuaded to take the view which its predecessors rejected. True that the earlier decision was by majority: I say nothing as to its correctness or as to the validity of the reasoning by which it was supported. That there were two eminently possible views is shown by the support for each by at any rate two members of the House. But doubtful issues have to be resolved and the law knows no better way of resolving them than by the considered majority opinion of the ultimate tribunal. It requires much more than doubts as to the correctness of such opinion to justify departing from it."

The issue of *res judicata* was also canvassed on behalf of the interveners though I must say with respect, not in depth so that I need not deal with it in my judgment.

Taken in its totality and despite the great persuasiveness and force of the arguments advanced on behalf of the applicant, I am unable to hold that an arguable case has been shown or put it in other words that the majority decision of this court in *Dato' Mohamed Hashim Shamsuddin* v. *Attorney-General, Hongkong* is wrong. Nor would I hold that this court is, as yet prepared to follow the House of Lords which will nowadays, given the proper circumstances, depart from its own earlier decisions.

In the result I would dismiss this application. No order as to costs.

Application dismissed.

Solicitors: *Sonni Pillay & Associates; Chooi & Co.*